In the Supreme Court of Pennsylvania.

At Nisi Prius, before Woodward, J.

O'BRIEN *vs.* THE PHILADELPHIA, WILMINGTON, AND BALTIMORE R. R. CO.[1]

1. If the plaintiff's injury is attributable in any degree to his own negligence, he cannot recover.
2. Negligence is the want of that care which men of common sense and common prudence ordinarily exercise in their employments.
3. If one who is about to cross a railroad at grades, on which locomotives run, he is bound to stop and listen, and look in both directions, before he allows his team to set foot within the rails, and an omission to do so is negligence on his part.

This was an action to recover damages for injuries to the person and property of the plaintiff, by a collision with a locomotive of defendants. The accident occurred at the crossing of a public highway, on which the plaintiff was driving his cart, and the railroad of the defendants.

Mr. F. C. Brewster, for plaintiff, presented the following points:

1. That the defendants are bound, while running a locomotive over the public highway of a city, to use every precaution necessary for the safety of the property and lives of the citizens.

2. That this duty is specially obligatory upon approaching and turning corners of public highways in a city.

3. That amongst other matters of precaution, the speed of the engine should be so regulated and controlled at the intersection of public streets in a city, that the train can be stopped, if necessary for the protection of the property or lives of those going along the public highway.

4. That it is incumbent on the defendants, in such circumstances, to give warning of their approach.

5. That the ordinance of Moyamensing, prohibiting a greater rate of speed than 12 miles an hour, does not authorize the defendants to go at that rate around curves and at intermediate sections of public highways, if that speed is dangerous to the public.

6. That the care required of the plaintiff is, that degree of care

[1] We are indebted to the learned counsel of the defendants for the report of this case.—*Eds. Am. Law Reg.*

which may reasonably be expected from a person in the plaintiff's situation.

7. That if there was negligence on the part both of the plaintiff and of the defendants, and the plaintiff, by the exercise of ordinary care could have avoided the injury, and he did not exercise such care, and thereby contributed in any degree to the injury, he could not recover; but, that if the plaintiff could not by the exercise of ordinary care, have avoided the injury, the want of such care on his part would not preclude him from recovery.

Messrs. *St. George T. Campbell* and *I. Hazlehurst* for the defendants, requested the judge to instruct the jury as follows:

1. That there is no evidence that the plaintiff was placed in the Pennsylvania hospital by the defendants or their agents, and therefore, in estimating the damages, if any are recoverable, the jury cannot include any injury or suffering of the plaintiff, caused by any disease there contracted.

2. That there is no evidence that the injury to the eyes of the plaintiff was caused by, connected with, or consequent upon, any act of the defendant, and the jury cannot include any injury or suffering of the plaintiff in respect thereto, in their estimate of damages, if any are recoverable.

3. That even if the jury believe that the servants of the defendants were guilty of carelessness, yet if the plaintiff was also himself negligent, he cannot recover.

4. That if the plaintiff could have avoided the collision by the exercise of common prudence or ordinary care, he cannot recover.

5. That whenever the relative position and levels of a railway and cross-road will permit, it is the duty, and common prudence and ordinary care require of every person having control of a vehicle about to cross the track, to look up and down the railway before passing upon or over it.

6. That when the position and grades of a cross-road and railway track are such, that the person controlling a vehicle about to cross the latter, can see an approaching train a sufficient distance to enable him to stop his vehicle before reaching the track, it is his duty, and he is required in the exercise of ordinary care and common prudence, to look along the line of the railway in

both directions, and himself stop to prevent a collision, and if he omits to do so, he can recover no damages for any consequences that may result to him therefrom.

7. That the placing of the locomotive and gravel train upon the southern of the double tracks, owned by the defendants below the crossing at which the plaintiff was injured, was a lawful use thereof by them, and that the position thereof does not, in any respect, affect the duties and obligations of any person about to cross such double track road, but that the same remain as stated in the fifth and sixth points; and the fact, that the attention of any person about to cross such tracks is attracted to such locomotive, whether standing on the adjoining track or in motion, will not excuse him from the obligation to stop, to look in both directions, or to listen before attempting to pass over such double track.

The charge of the court was delivered by

WOODWARD, J.—This is an action in which the plaintiff claims damages for an injury inflicted upon his person and property by the servants of the defendants. It is in proof, that at the time of the occurrence complained of, both parties were prosecuting their ordinary and lawful occupations on these intersecting highways. Both had the right to pursue these highways, but this right was to be so exercised by each as not to hurt the other; and the roads were capable of being so used. They were designed, both of them, to promote the public convenience and welfare, and if they cannot co-exist harmlessly, they have failed of the object of their institution, and one or the other should be abated as a common nuisance.

The plaintiff invited to travel the open street, and the company authorized by law to run cars on their road, could not injure each other if both were careful; if neither was regardless of the social duty which he owed the other.

The fact of collision, then, proves negligence in somebody. It may be the negligence of the company; the negligence of the plaintiff, or the mutual negligence of both parties. The jury are to determine from all the evidence, where the negligence attaches.

The plaintiff can recover only for the negligence of the company. If his injury was attributable *in any degree* to negligence on his

own part, he is not entitled to damages. Though the company's agents may have been in fault, and in greatest fault, yet if the plaintiff contributed by his own carelessness, to his injury, the law will not adjust the balance of blame between them, nor award damages to either, for the result of their compound negligence. Every man is bound to take reasonable care of himself, and when he seeks redress for personal injuries, he must show that he has done so.

This term *negligence*, which we use so much, must be clearly defined to the jury. It is sometimes defined as the want of ordinary care, a definition which stands in as much need of definition as the thing itself. Negligence may be described as the want of that care which men of common sense and common prudence ordinarily exercise in like employments. You are to have regard to the business in which O'Brien and the Railroad Company were engaged when the accident occurred, and to ask yourselves which of them omitted that degree of care which men of ordinary prudence exercise when engaged in similar employments.

First, as to the defendants; the jury will consider whether the train was conducted as a prudent man would have conducted it in the suburbs of a great city. Is notice usually given of the progress and approach of trains where railroads run through densely populated districts, and cross numerous streets? Did the defendants ring and whistle? Was their speed reasonable, all things considered? These are questions for the jury. As to the signals, the evidence is conflicting. The engineer, the conductor, a passenger, and one or two other witnesses, swear that the bell was rung from the time they left the depot, and the engineer says the whistle was sounded when the peril of the plaintiff was discovered, and before the collision took place. Several witnesses produced by the plaintiff, testify that they either live in the neighborhood, or happened to be there at the time, and that they heard neither bell nor whistle.

Generally, affirmative evidence is more reliable than negative. Signals which people are accustomed to hear, are often disregarded when actually given, and it is more probable that these witnesses are mistaken who say they did not hear the bell, than it is that the

engineer is mistaken, whose business it was to ring it. Yet it is argued, with what force the jury will say, that the engineer, whose duty it was to ring, and who generally did so, must be understood as speaking of his belief, founded in his general practice, rather than of his recollection of what he did on a particular day, so long past as November, 1854.

A similar discrepancy exists in the evidence as to whether an omnibus intercepted the plaintiff's view up the road. His witnesses locate the omnibus between him and the approaching train, whilst the witnesses on the part of the defence, deny that there was any omnibus there. Now the driver of the omnibus, and the passenger who was in it, are more likely to be correct about its location, than others, who, though situated so they might have seen it, had their attention directed to other objects, and failed to notice it. As to the speed of the train, the evidence proves that it was less than twelve miles an hour, which is the rate allowed by the ordinance of the district of Moyamensing, and it is argued that this is decisive on this point. I do not think so. The rate limited by the ordinance is to be considered, but the question of negligence does not depend on municipal ordinances, but on the general experience and observation of the jury, regard being had to all the circumstances of the case. The velocity of the train may have been within the ordinance, and yet in the actual condition of facts, unreasonable and imprudent. In other circumstances, a speed beyond the rate of the ordinance, might not be deemed reckless. The jury are not to disregard the rate legalized by the ordinance, but they are to decide, in view of all the circumstances, whether the train was conducted with such speed, and such signals, as prudent men ordinarily employ in such places. If they find that it was, there is an end of the case, for in that manner the law allows the company to use their road. And an injury that results from a lawful and prudent exercise of their rights, must be referred to the negligence of some other party, and cannot subject them to damages.

But if the jury find that the company was not faultless, that they did or omitted anything that would constitute negligence as I have defined it, the next inquiry will relate to the conduct of the plaintiff.

He was a carter, and the same general principles apply to him as to the defendants. He was bound to pursue his business with all that regard to the safety of himself and others, which prudent men commonly employ in like occupations. Did he demean himself in that manner? In answer to the 6th and 7th points on the part of the defendants, I instruct the jury that a carter, or any man having charge of a team, who is about to cross a railroad at grade on which locomotives run, is bound to stop and listen, and look in both directions, before he permits his team to set foot within the rails, and omission to do so is negligence on his part. This rule of law is demanded by a due regard to the safety of life and property, both his own and that which is passing on the railroad. From the evidence, it is perfectly apparent that the plaintiff could have seen the approaching train if he had looked. If he saw it, it was extreme rashness in him to allow his lead horse to advance so far; and if he did not see it, it must have been because he did not look.

I state the general rule, but whether it is applicable to the plaintiff in the circumstances which surround him, is for the jury. A few yards on his right, some witnesses think seventy, there was a gravel train, with a locomotive attached, standing on one of the tracks, and liable to start any moment, and on his left, according to his witnesses, was the omnibus in close proximity to the crossing.

Now, for these circumstances the plaintiff was in nowise responsible, and the question is, whether they constituted any excuse for his not looking up the road. Had he listened he could not have heard the bell or whistle, for as we are now contemplating the case, it must be presumed they were not sounded. I have already instructed the jury, that if they believe these signals were given, and the speed was reasonable, the plaintiff was bound to take notice of them. If the jury so find, they will not reach this part of the case, but if they find the signals were not given, and are thus brought to the consideration of the plaintiff's conduct, he must be regarded as subject to the general rule—bound to look as well as listen, unless the circumstances, to which I have adverted, were sufficient, in the judgment of the jury, to excuse him. It is argued that the gravel

train was on its appropriate track, and lawfully standing where it was. Doubtless. But if the company so engaged the plaintiff's attention to the gravel train, as to divert it from the approaching passenger train, can they allege that his failure to see the latter was negligence in him? I refer this question to the jury. If the jury see nothing in this circumstance to excuse the plaintiff for not looking out for the passenger train coming at its customary time, then there was negligence on the part of the plaintiff, and he cannot recover, even if there was negligence on the part of the company. If, however, they think the general rule of law was not applicable to him in his peculiar situation, then the failure of the engineer to give the accustomed signals was negligence for which the company would be responsible, and the plaintiff is entitled to have his damages assessed. The only remaining subject to which I may address a few words, is the measure of the damages.

The damages, if any, should be merely compensatory, and not vindictive. The plaintiff was carried to the hospital to have his broken leg cured, and there, it is said, he contracted ophthalmia, by reason of which he lost the sight of one eye altogether, the other being also much impaired. It is shown that there was no such disease in the hospital, and the plaintiff has failed to show that the injury to his eyes was a consequence of the collision on the railroad. Damages are not, therefore, to be given him on account of his eyes, but for the horse that was killed, for the loss of his time, and for the expenses attending the cure of his fractured limb, he is entitled to recover, if under the evidence, and on the principles of law that have been explained, the jury consider him entitled to their verdict.

[The judge then proceeded to notice the special points submitted by counsel on each side, and declined to charge as requested in the first three points on the part of the plaintiff, but repeated the principles of law as contained in the foregoing charge.

The 4th, 5th, and 6th points of the plaintiff, and the first part of the 7th point, were affirmed, but instead of the latter part of the 7th point, the jury were referred to the charge.

The defendants' points were all affirmed except the 7th, which was answered with a modification, as in the charge.]

Whereupon the counsel for both plaintiff and defendants excepted before the verdict, and prayed that the charge be filed, which was done.

The jury found a verdict for defendants.

In the United States District Court for the Southern District of New York.

THOMAS LEITCH *vs.* THE STEAMER GEORGE LAW.

The steamship George Law coming into the port of New York, was spoken by a licensed pilot, who offered his services as such legally licensed pilot, which were refused; he then demanded a certain sum, claiming to be entitled to it under the pilotage laws enacted by State statute, and libeled the ship: *held*, that he had no lien, and that the ship was not liable.

The libel alleges that on the 12th of June, 1857, the libelant was a pilot, duly licensed and qualified according to the laws of the State of New Jersey and the Statutes of the United States, to pilot vessels to and from the port of New York, by way of Sandy Hook; that being then on board the pilot-boat Thomas H. Smith, upon the high seas, and within the admiralty and maritime jurisdiction of this court, about eight miles off Barnegat, seeing the said steamship George Law (sailing under a register) approaching, drawing thirteen feet of water, and bound to the port of New York, said steamship not having been before that spoken by a licensed pilot, he immediately spoke said steamship and offered her master his services as pilot, to pilot said steamship into the port of New York as the master of said steamship might direct, which offer and services aforesaid the master refused, and that thereby the libellant became entitled, by law, to demand and receive from the master and owner of said ship the sum of $39 65; that neither the master nor owner of said ship has paid that sum, but it yet remains, though often